

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MA YONGTIAN,

Plaintiff,

v.

XI JINPING, INDIVIDUALLY AND AS
GENERAL SECRETARY OF THE CPC
CENTRAL COMMITTEE, CHAIRMAN OF
THE CPC CENTRAL MILITARY
COMMISSION, PRESIDENT OF THE
PEOPLE'S REPUBLIC OF CHINA, AND
PARAMOUNT LEADER OF THE
PEOPLE'S REPUBLIC OF CHINA,

Defendant.

No. 15 Civ. 6968 (AT) (GWG)

**SUGGESTION OF IMMUNITY
SUBMITTED BY THE UNITED STATES OF AMERICA**

PREET BHARARA
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Southern District of New York
Attorney for United States of America
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ELLEN BLAIN
Assistant United States Attorney
--OF COUNSEL--

The United States of America, by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, pursuant to 28 U.S.C. § 517,¹ respectfully informs the Court of the interest of the United States in the pending lawsuit against President Xi Jinping, the sitting head of state of the People's Republic of China, and hereby informs the Court that President Xi is immune from this suit.² In support of its interest and determination, the United States sets forth as follows:

1. The United States has an interest in this action because President Xi is the sitting head of a foreign state, and thus this lawsuit raises the question of President Xi's immunity from the Court's jurisdiction while in office. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has authority to determine the immunity from suit of sitting heads of state. The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and the conduct of its international relations, to recognize President Xi's immunity from this suit while in office. As discussed below, this determination is controlling and is not subject to judicial review. Indeed, no court has ever subjected a sitting head of state to suit once the Executive Branch has determined that he or she is immune.

2. The Office of the Legal Adviser of the Department of State has informed the Department of Justice that the Embassy of the People's Republic of China has formally requested

¹ 28 U.S.C. § 517 provides that "any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States."

² In this Suggestion of Immunity, the United States expresses no view on the merits of Plaintiff's claims against President Xi.

the Government of the United States to “take the steps necessary to have this action against the President dismissed on the basis of his immunity from jurisdiction as a sitting foreign head of state.” Letter from Mary E. McLeod to Benjamin C. Mizer, dated September 22, 2015 (copy attached as Exhibit A). The Office of the Legal Adviser has further informed the Department of Justice that the “Department of State recognizes and allows the immunity of President Xi as a sitting head of state from the jurisdiction of the United States District Court in this suit.” *Id.*

3. For many years, the immunity of both foreign states and foreign officials was determined exclusively by the Executive Branch, and courts deferred completely to the Executive’s foreign sovereign immunity determinations. *See, e.g., Republic of Mexico v. Hoffmann*, 324 U.S. 30, 35 (1945) (“It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”). In 1976, Congress codified the standards governing suit against foreign states in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611, transferring to the courts the responsibility for determining whether a foreign state is subject to suit. *See id.* § 1602 (“Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”).

4. As the Supreme Court has explained, however, Congress has not similarly codified standards governing the immunity of foreign officials from suit in our courts. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (“Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute’s origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.”). Instead, when it codified the principles governing the immunity of foreign states, Congress left in

place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *See id.* at 323 (“We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.”). Thus, the Executive Branch retains its historic authority to determine a foreign official’s immunity from suit, including the immunity of foreign heads of state. *See id.* at 311 & n.6 (noting the Executive Branch’s role in determining head of state immunity).

5. The doctrine of head of state immunity is well established in customary international law. *See* Satow’s Guide to Diplomatic Practice 9 (Lord Gore-Booth ed., 5th ed. 1979). In the United States, head of state immunity determinations are made by the Department of State, incident to the Executive Branch’s authority in the field of foreign affairs.

6. The Supreme Court has held that the courts of the United States are bound by Suggestions of Immunity submitted by the Executive Branch. *See Hoffman*, 324 U.S. at 35-36; *Ex parte Peru*, 318 U.S. 578, 588-89 (1943). In *Ex parte Peru*, in the context of foreign state immunity, the Supreme Court, without further review of the Executive Branch’s immunity determination, declared that such a determination “must be accepted by the courts as a conclusive determination by the political arm of the Government.” 318 U.S. at 589. After a Suggestion of Immunity is filed, it is the “court’s duty” to surrender jurisdiction. *Id.* at 588. The courts’ deference to Executive Branch determinations of foreign state immunity is compelled by the separation of powers. *See, e.g., Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

7. For the same reason, courts also have routinely deferred to the Executive Branch’s immunity determinations concerning sitting heads of state. *See Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) (“We must accept the United States’ suggestion

that a foreign head of state is immune from suit—even for acts committed prior to assuming office—as a conclusive determination by the political arm of the Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations.” (quotation omitted)); *Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) (“The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff.”); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (noting that “in the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state”; “flexibility to react quickly to the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision”).

8. When the Executive Branch determines that a sitting head of state is immune from suit, judicial deference to that determination is predicated on compelling considerations arising out of the Executive Branch’s authority to conduct foreign affairs under the Constitution. *See Ye*, 383 F.3d at 626 (citing *Spacil*, 489 F.2d at 618). Judicial deference to the Executive Branch in these matters, the Seventh Circuit noted, is “motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved.” *Id.* *See also Spacil*, 489 F.2d at 619 (“Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation’s primary organ of international policy.” (citing *United States v. Lee*, 106 U.S. 196, 209 (1882))); *Ex parte Peru*, 318 U.S. at 588.³ As noted above, in no case has a court subjected a sitting head of state to suit

³ As other courts have explained, the Executive Branch possesses substantial institutional resources and extensive experience with which to conduct the country’s foreign affairs. *See, e.g., Spacil*, 489 F.2d at 619; *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-14 (4th Cir.

after the Executive Branch has determined that the head of state is immune.⁴

9. Under the customary international law principles accepted by the Executive

1980). Furthermore, “in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves.” *Spacil*, 489 F.2d at 619.

⁴ Indeed, courts have dismissed a number of cases against heads of state (and, on the same basis, cases against heads of government). See, e.g., Order at 3, *American Justice Center v. Modi*, No. 14 Civ. 7780 (S.D.N.Y. Jan. 14, 2015) (Torres, J.) (dismissing the complaint because “in light of the determination by the Executive Branch that Prime Minister Modi is entitled to immunity as the sitting head of a foreign government, he is immune from the jurisdiction of this Court in this suit”); *Tawfik v. al-Sabah*, 2012 WL 3542209, *3-4 (S.D.N.Y. Aug. 16, 2012); *Manoharan v. Rajapaksa*, 845 F. Supp. 2d 260 (D.D.C. 2012), *aff’d*, 711 F.3d 178 (D.C. Cir. 2013); *Habyarimana v. Kagame*, 821 F. Supp. 2d 1244, 1263-64 (W.D. Okla. 2011) (“Where the United States’ Executive Branch has concluded that a foreign head of state is immune from suit, and where it has urged the Court to take recognition of that fact and to dismiss the suit pending against said head of state, the Court is bound to do so.”), *aff’d*, 696 F.3d 1029 (10th Cir. 2012); *Howland v. Resteiner*, No. 07-CV-2332, 2007 WL 4299176 (ILG), at *2 n.2 (E.D.N.Y. Dec. 5, 2007) (noting “there is no doubt that [the sitting Prime Minister of Grenada] is entitled to immunity from th[e] Court’s jurisdiction” after Executive Branch filed Suggestion of Immunity); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 110 (D.D.C. 2005) (“When the Executive Branch concludes that a recognized leader of a foreign sovereign [in this case, Prime Minister Ariel Sharon of Israel] should be immune from the jurisdiction of American courts, that conclusion is determinative.”); *Leutwyler v. Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001) (holding that the Executive Branch’s immunity determination on behalf of the Queen of Jordan “is entitled to conclusive deference from the courts”); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 297 (S.D.N.Y. 2001) (dismissing a suit against the President and Foreign Minister of Zimbabwe based upon a Suggestion of Immunity filed by the Executive Branch), *aff’d on other grounds sub nom.*, *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004); *First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996) (“The United States has filed a Suggestion of Immunity on behalf of H.H. Sheikh Zayed, and courts of the United States are bound to accept such head of state determinations as conclusive.”); *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D. Tex. 1994) (concluding that the recognition by the Executive Branch of King Fahd’s immunity as the head of state of Saudi Arabia required dismissal of a complaint against King Fahd for false imprisonment and abuse), *aff’d*, 79 F.3d 1145 (5th Cir. 1996); *Lafontant v. Aristide*, 844 F. Supp. 128, 132 (E.D.N.Y. 1994) (recognizing that the determination by the Executive Branch of Haitian President Aristide’s immunity was binding on the court and required dismissal of the case); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) (holding that the determination of Prime Minister Thatcher’s immunity was “conclusive” in dismissing a suit that alleged British complicity in U.S. air strikes against Libya), *aff’d in part and rev’d in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989); *Kline v. Kaneko*, 535 N.Y.S. 2d 303, 304-05 (N.Y. Sup. Ct. 1988) (dismissing suit based on “conclusive” determination of head of state immunity), *aff’d*, 546 N.Y.S. 2d 506 (N.Y. App. Div. 1989).

Branch, head of state immunity attaches to a head of state's status as the current holder of the office. In this case, because the Executive Branch has determined that President Xi, as the sitting head of a foreign state, enjoys head of state immunity from the jurisdiction of U.S. courts in light of his current status, President Xi is entitled to immunity from the jurisdiction of this Court over this suit.

CONCLUSION

For the foregoing reasons, the United States respectfully submits to the Court that President Xi is immune in this action.

Date: October 6, 2015

Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York

/s/ Ellen Blain

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Exhibit A

**Letter from Principal Deputy Legal Adviser Mary E. McLeod to Principal Deputy
Assistant Attorney General Benjamin C. Mizer, dated September 22, 2015**



United States Department of State

Washington, D.C. 20520

September 22, 2015

Benjamin C. Mizer
Principal Deputy Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Re: *Ma Jingtian v. Xi Jinping*, No. 15-CV-6968 (S.D.N.Y.)

Dear Mr. Mizer:

The above-referenced suit names as a defendant Xi Jinping, who is currently the President of the People's Republic of China. In light of his current status as China's Head of State, the People's Republic of China has asked the Department of State to take the steps necessary to have this action against the President dismissed on the basis of his immunity from jurisdiction as a sitting foreign head of state.

The Department of State recognizes and allows the immunity of President Xi as a sitting head of state from the jurisdiction of the U.S. District Court in this suit. Under common law principles of immunity articulated by the Executive Branch in the exercise of the President's constitutional authority over foreign affairs and informed by customary international law, President Xi, as the sitting head of state of a foreign state, is immune while in office from the jurisdiction of the U.S. District Court in this suit.

I would emphasize the particular importance of obtaining the prompt dismissal of the proceedings against President Xi in view of the significant foreign policy implications. Accordingly, the Department of State requests that the Department of Justice submit a suggestion of immunity to the district court at the earliest opportunity.

Sincerely,

A handwritten signature in cursive script that reads "Mary E. McLeod".

Mary E. McLeod
Principal Deputy Legal Adviser